SIMPANG MAJU ENTERPRISES SDN BHD v. SOH YEN LING (AS ADMINISTRATOR OF THE ESTATE OF CHAN YAU SENG, DECEASED); MALAYAN BANKING BHD (THIRD PARTY)

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[WRIT SUMMONS NO: 22NCVC-50-09-2015]
20 SEPTEMBER 2016

CONTRACT: *Termination – Validity – Termination of sale and purchase agreement for non-payment of balance purchase price – Third party claim against financier for failure to disburse loan sum after death of purchaser (deceased) – Whether financier gave undertaking to pay loan sum – Whether financier breached loan agreement by failing to disburse loan sum – Whether obligation to pay balance purchase price vested on estate of deceased – Whether non-payment constituted fundamental breach of sale and purchase agreement – Whether termination of sale and purchase agreement valid and lawful – Whether plaintiff entitled to revesting of property as registered and beneficial owner*

LAND LAW: *Sale and purchase of land – Termination – Non-payment of balance purchase price – Third party claim against financier for failure to disburse loan sum after death of purchaser (deceased) – Whether financier gave undertaking to pay loan sum – Whether financier breached loan agreement by failing to disburse loan sum – Whether obligation to pay balance purchase price vested on estate of deceased – Whether non-payment constituted fundamental breach of sale and purchase agreement – Whether termination of sale and purchase agreement valid and lawful*

CIVIL PROCEDURE: *Third party proceedings – Contribution from third party – Claim against third party (financier) for failure to disburse loan sum – Whether financier gave undertaking to pay loan sum – Whether financier breached loan agreement by failing to disburse loan sum – Whether financier breached loan agreement by unilaterally terminating loan agreement – Whether action against third party could be sustained*

The deceased entered into a sale and purchase agreement with the plaintiff for the purchase of a house ('the property') being built by the plaintiff, as developer at the price of RM338,800. The deceased obtained a loan from Malayan Banking Berhad ('the third party') to part finance the purchase of the property. The total loan amount of RM297,037 comprised two components, *ie* the sum of RM9,137 as the premium for the Mortgage Reducing Term Assurance ('MRTA') and the balance RM287,900 was to pay the balance purchase price. The deceased had paid the difference between the loan sum and purchase price amounting to RM50,900. The third party gave the plaintiff a conditional undertaking to pay the progressive payments provided that all pre-disbursement conditions of the loan are fulfilled. One

of the pre-disbursement conditions was the registration of a charge on the property in favour of the third party. To facilitate the entry of the charge in favour of the third party where the full purchase price had not been paid, the registered ownership of the property was transferred in the name of the deceased and subsequently the charge in favour of the third party was entered. Before the third party made any disbursement of the loan, or any part thereof, the deceased passed away. The third party did not make any disbursement of the loan, terminated the loan agreement and discharged the charge entered on the property in its favour. The property, however, remained registered in the name of the deceased as the registered owner. The plaintiff demanded payment of the outstanding sum of RM287,900 from the deceased's personal representative ('the defendant') and subsequently terminated the sale and purchase agreement for non-payment of the balance purchase price. Then, the plaintiff sought, *inter alia*, (i) a declaration that the sale and purchase agreement entered between the plaintiff and the deceased was void; (ii) a declaration that the transfer of ownership of the property in the name of deceased was void; and (iii) an order compelling the defendant to retransfer ownership of the land to the plaintiff. The defendant filed a third party claim against the third party alleging that the third party, having taken a charge on the property and further having given an undertaking to pay the loan sum to the plaintiff in accordance to the facility agreement had breached the loan agreement by failing to disburse the loan to the plaintiff promptly and/or by unilaterally terminating the loan agreement by discharging the charge. The issues that arose for consideration, *inter alia*, were (i) whether the termination of the sale and purchase agreement by the plaintiff was lawful; (ii) whether the third party was under a duty to disburse the loan promptly, and if so, did it fail to discharge that duty; and (iii) whether the termination of the loan agreement by the third party was valid and lawful.

Held (allowing plaintiff's claim; dismissing defendant's third party claim):

(1) Clause 5(4) of the sale and purchase agreement provides that the obligation to pay the purchase price was always on the deceased, as purchaser. As such, according to cl. 5(4) of the SPA, the onus is on the estate of the deceased to make payment of the balance purchase price. On the facts, the SPA is in the standard form Schedule G of the Housing Development (Control and Licensing) Regulations 1989, and cl. 8 stipulates that time shall be the essence of the contract in relation to all provisions of the agreement. Thus, the non-payment of balance purchase price in accordance to the stipulated time is a fundamental breach of the SPA, and amounts to a repudiation of the contract on the part of the defendant. The plaintiff was entitled to accept the repudiation and terminate the contract in accordance to the stipulations in cl. 10(1)(a)(i) of the SPA. Therefore, the plaintiff's termination of the SPA was valid and lawful. (paras 25, 26, 30 & 31)

(2) Upon rescission of a contract involving the sale of land, the property will revest onto the original owner as if the contract was never entered into. Although registered ownership had been transferred to the deceased, the beneficial ownership remained with the plaintiff until the full purchase price is paid. It is only upon the payment of the full purchase price that the beneficial ownership of the property vests with the defendant. Thus, following the termination of the SPA, the plaintiff would be entitled to a revesting of the property in its name as the registered and beneficial owner, as if the SPA was never entered into in the first place. (paras 33 & 34)

(3) The third party was not in breach of its duty of care to make prompt disbursement of the loan. Additionally, the third party's onus to pay the plaintiff as per the letter of undertaking would only arise when the conditions for payment stipulated in the letter of undertaking have been first fulfilled, for the undertaking is at best a conditional undertaking. The payment of the MRTA premium is linked to the initial disbursement of the loan. Only when the first drawdown of the loan had been made, would the third party make payment of MRTA premium, and since the initial loan disbursement was not made, the third party did not breach its contractual obligations to pay the MRTA premium having breached its duty of care. (para 43)

(4) From the contractual clauses, it was evident that the death of the deceased, the borrower, was an event of default. In the event of a default occurring, the third party is at liberty to withdraw and/or cancel the facility. Additionally, the death of the deceased is a material adverse change in circumstances. In such an event, it is open to the third party to consider whether it wishes to continue with the agreement or to cancel it. The third party in exercising its discretion had chosen to cancel the facility. In the circumstances, it was within the third party's contractual right to terminate the loan agreement upon the death of the deceased. Therefore, there was no basis on law, or in fact, to sustain the defendant's action against the third party. (paras 44 & 45)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Khatijah Ahmad v. CIMB Bank Bhd [2011] 1 LNS 1518 HC ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***

Penang Development Corporation v. Khaw Chin Boo & Anor [1993] 3 CLJ 167 HC ***(refd)***

RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors And Another Appeal [2015] 1 CLJ 309 FC ***(refd)***

Siti Juriah Sahari & Yang Lain lwn. Citibank Bhd & Satu Lagi [2010] 1 CLJ 252 HC ***(refd)***

A *Soon Yee Ling & Anor v. Lim Ah Hun [2010] 2 CLJ 785 FC* ***(refd)***
Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Legislation referred to:
B Contracts Act 1950, s. 47
Housing Development (Control And Licensing) Regulations 1989, Schedule G

For the plaintiff - Terence Chan; M/s KP Ng & Amardas
For the defendant - Melvin Tay, Damian Yeo & Benjamin Tay; M/s Damian SL Yeo & LC Goh
C *For the 3rd party - Wong Fook Meng & Tan Siok Khon; M/s Chee Siah Kee & Partners*

Reported by Sandra Gabriel

JUDGMENT

D **Vazeer Alam Mydin Meera J:**

The Antecedent Facts And Plaintiff's Claim

[1] The late Chan Yau Seng ("the deceased") entered into a sale and purchase agreement dated 25 May 2012 with the plaintiff for the purchase of a house being built by the plaintiff, as developer, on a plot of land known E as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834 ("the property") at a price of RM338,800.

[2] The deceased obtained a loan from Malayan Banking Berhad, the third party, to part finance the purchase of the property. The total loan amount of RM297,037 comprised two components, ie, the sum of RM9,137 as the F premium for the mortgage reducing term assurance (MRTA) to cover the loan, and the balance RM287,900 was to pay the balance purchase price. Messrs Anuar Hong & Ong was the firm of solicitors who acted for the deceased in both the sale and purchase agreement and the loan documentation.

G **[3]** The loan documentation was executed and dated 6 August 2012. The plaintiff confirmed to Messrs Anuar Hong & Ong that the deceased had paid the difference between the loan sum and purchase price amounting to RM50,900. Therefore, the third party would pay all subsequent progressive payments of the purchase price to the plaintiff, upon all pre-disbursement H conditions having been fulfilled.

[4] The third party *via* letter dated 23 August 2012 gave the plaintiff a conditional undertaking to pay the progressive payments provided that all pre-disbursement conditions of the loan are fulfilled. One of the I pre-disbursement conditions would be the registration of the charge on the property in favour of the third party. To facilitate the entry of the charge in favour of a financier of a property under construction where the full purchase

price has not been paid, it is customary practice for the registered ownership of the property that is under construction, ie, the subject property of the sale, to be transferred in the name of the purchaser and then for the charge in favour of the financier being entered, usually simultaneously one after the other. This is normally done on the basis of cross obligations or undertakings given by the parties concerned to each other.

[5] The present case is no different. The plaintiff had forwarded the original issue document of title to the property as well as the duly executed memorandum of transfer in favour of the deceased upon the third party's usual undertaking to pay the loan sum to the plaintiff in accordance to the SPA. The transfer of ownership of the property to the deceased and charge in favour of the third party was registered on 29 August 2012. Then, Messrs Anuar Hong & Ong *vide* letter dated 3 September 2012 wrote to the third party advising drawdown and disbursement of the loan, progressively. The first drawdown would also include the payment of the MRTA premium to the insurance company. It is an uncontroverted fact that by that date a sum of RM169,320 in a progressive claim was outstanding to be paid by the deceased to the plaintiff. The plaintiff made a claim for payment this sum of RM169,320 *vide* letter dated 20 September 2012 supported by the architect's certificate.

[6] Before the third party made any disbursement of the loan or any part thereof, the deceased passed away on 27 September 2012 in a tragic road accident. The third party did not make any disbursement of the loan and there seems to have been some discussion between the plaintiff, defendant and third party on this matter. The third party through its solicitors' letter of 22 May 2013 informed the plaintiff that the third party would not be making any disbursement of the loan. Nevertheless, the plaintiff kept sending notice of periodic progress claims to the third party, however, none were honoured with payment.

[7] The plaintiff had completed construction of the property and on 5 August 2013 gave notice of delivery of vacant possession and demanded payment of the balance purchase price. The deceased's personal representative, ie, the defendant, did not take vacant possession of the property, nor was the outstanding balance purchase paid. The plaintiff then *vide* letter dated 30 October 2013 addressed to the defendant demanded payment of the outstanding sum of RM287,900 within 14 days failing which the plaintiff shall terminate the sale and purchase agreement. The defendant did not make payment of the outstanding purchase price within the 14 days.

[8] The defendant was appointed the administrator of the estate of the deceased on 14 November 2013 under the Small Estates (Distribution) Act 1955. The plaintiff then by letter dated 19 November 2013 gave notice to the defendant that, as a corollary to its earlier letter of 30 October 2013, the sale and purchase agreement was terminated for non-payment of the balance purchase price.

[9] Following the termination of the loan agreement, the third party on 11 December 2013 discharged the charge entered on the property in its favour. However, the property remained registered in the name of the deceased as the registered owner.

[10] Wherefore, the plaintiff claims for the following reliefs:

(a) a declaration that the sale and purchase agreement dated 25 May 2012 entered between the plaintiff and the deceased is void;

(b) a declaration that the transfer of ownership of the land known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834 in the name of deceased on 29 August 2012 *vide* Presentation No: 11965/2012 is void;

(c) an order compelling the defendant to execute all forms and documents to retransfer ownership of the land known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834, to the plaintiff, failing which the Senior Assistant Registrar be authorised to execute all such documents; and

(d) damages at the rate of 10% per annum on the outstanding sum of RM287,900 calculated from the date when the progressive payments were due.

The Defendant's Defence And Counterclaim

[11] The defendant in her defence states that the deceased had to date paid the sum of RM50,900 as deposit and part payment of the purchase price to the plaintiff. The defendant avers that the balance of the purchase price amounting to RM287,900 is to be paid by the third party from the loan granted to the deceased, and in this regard, the defendant further avers that the third party had given the undertaking to do so. As such the defendant states that the plaintiff ought to have named the third party as a defendant in the main action, as the third party had refused to disburse the loan.

[12] The defendant further contends that the termination of the sale and purchase agreement by the plaintiff and the cancellation of the loan and/or the non-disbursement of the loan by the third party are improper and invalid in law.

[13] By reason of the foregoing, the defendant avers that the estate of the deceased has suffered loss and damage and claims for the same. Over and above the payment of the partial purchase price of RM50,900, the defendant states that the estate of the deceased had also incurred other related expenses, which includes the sum of RM12,000 as solicitors fees and disbursements for the sale and purchase agreement and loan documentation, the sum of RM3,388 for stamp duty, the sum of RM210 as processing fee for the loan, and the sum of RM59 as quit rent.

[14] Wherefore, the defendant claims the following reliefs: A

(a) a declaration that the sale and purchase agreement dated 25 May 2012 is valid and subsisting;

(b) a declaration that the registration of transfer of ownership of the property known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, B State of Melaka, held under HS(D) 19834, in the name of deceased is valid and lawful; and

(c) in the alternative to the above, special and general damages.

[15] The plaintiff denies the defendant's counterclaim and states that the defendant does not have any discernible cause of action against the plaintiff. C

The Third Party's Claim

[16] The defendant after having obtained leave of court filed a third party claim against the third party principally on the grounds that if the defendant is held liable to the plaintiff in the main action, then the defendant is entitled D to claim against the third party for indemnity and contribution.

[17] The defendant alleges that the third party having taken charge on the property and further having given an undertaking to pay the loan sum to the plaintiff in accordance to the facility agreement had breached the contract by failing to disburse the loan to the plaintiff promptly and/or by unilaterally E terminating the loan agreement by discharging the charge.

[18] The defendant further alleges that the third party was negligent in failing to make prompt payment of the MRTA premium, thus depriving the estate from the MRTA benefit following the deceased's death. The F particulars of negligence are provided in para. 17 of the statement of claim against third party.

[19] Wherefore the defendant claims against the third party are the following reliefs:

(a) order for indemnity or contribution towards liability in respect of the G plaintiff's claim;

(b) the issues raised in the plaintiff's main claim be determined not only between the plaintiff and the defendant but holistically as between the plaintiff and/or defendant and/or third party; H

(c) a declaration that the withdrawal or cancellation of the letter of offer dated 21 May 2012, the facility agreement dated 6 August 2012, the letter of undertaking dated 23 August 2012 and/or the discharge of charge dated 11 December 2013 by the third party is invalid in law;

(d) an order of specific performance or alternatively damages for the third I party's breach and/or failure to procure the MRTA within time; and

(e) damages – general, special and aggravated.

[20] The third party denies the defendant's third party claim and avers that the disbursement of the loan is subject to the third party's satisfaction that all conditions precedent have been fulfilled. Further, the third party states that under the terms of the facility agreement it is entitled to withdraw the loan facility at any time without giving reasons. Additionally, the third party states that the facility may be withdrawn in the event of the death of the borrower, ie, the deceased in this case.

[21] The third party further states that the loan was not disbursed prior to the death of the deceased as all pre-disbursement conditions were not met, and in particular several documents that were required by the third party were not forwarded.

[22] The third party states that when it came to knowing of the deceased's death on 27 September 2012, the third party was entitled to withdraw the loan and/or terminate the facility agreement. The third party avers that in discussions with the defendant after the deceased's passing, it was suggested that the defendant get someone else to replace the deceased as the borrower. However, the defendant refused to substitute the deceased and insisted on the loan being disbursed in the name of the deceased.

[23] Therefore, the third party denies any breach of contract or negligence in the non-disbursement of the loan, prior to and/or after the death of the deceased.

Issue 1: Whether The Termination Of The Sale And Purchase Agreement By The Plaintiff On 19 September 2013 Is Lawful

[24] It is an uncontroverted fact that the plaintiff had completed building the house and notice of delivery of vacant possession had been given. It is also an undisputed fact that when the plaintiff terminated the sale and purchase agreement on 19 November 2013, the deceased had only paid the sum of RM50,900 towards the purchase price with a balance of RM287,900 remaining unpaid. The defendant contends that pursuant to the facility agreement, and the letter of undertaking given by the third party, the onus is on the third party to make payment of the loan sum, which is equivalent to the outstanding balance purchase price. However, the third party asserts that its obligation to disburse the loan sum is conditional upon fulfilment of the conditions precedent and that the conditions precedent were not fulfilled to their satisfaction. As such the third party asserts that the defendant's complaint of breach of contract and/or negligence on the part of the third party is misplaced. I will now consider these arguments.

[25] Clause 5(4) of the SPA provides that:

> Subject to subclause (3), if the Purchaser fails to accept the Loan or default in complying with the necessary requirement for the application or is disqualified as a result of which the Loan is withdrawn by the Financier, as the case may be, the Purchaser shall then be liable to pay the Vendor the whole of the purchase price or such part thereof as shall then remain outstanding.

It is clear from cl. 5(4) that the obligation to pay the purchase price is always on the deceased, as the purchaser. In fact, the third party makes it very clear in the letter of undertaking issued to the plaintiff that the undertaking is conditional and state unequivocally "Nothing herein contained shall affect the obligations on the part of the said purchasers to be performed under the said sale and purchase agreement". And following the deceased's death, that obligation to pay is borne by the estate of the deceased. The fact of the matter is that the third party has cancelled the loan facility. As such, according to cl. 5(4) of the SPA, the onus is on the estate of the deceased to make payment of the balance purchase price. The evidence shows that this fact was communicated to the defendant by the plaintiff, and the defendant (DW1) admitted during cross-examination that she was so informed by the plaintiff (see p. 26 of the notes of proceedings).

[26] Even though the deceased, and subsequently the estate of the deceased, failed to make payment of the balance purchase price progressively during the period when the house was under construction, the plaintiff did not rush to terminate the agreement. The evidence shows that the plaintiff gave the defendant time to make payment and proceeded with the construction work till completion and was prepared to deliver vacant possession. In fact, when the final demand for payment was made by the plaintiff well after notice of vacant possession had been given, the demand was only for the outstanding principal amount of the balance purchase price of RM287,900 without any claim for contractual late payment interest. However, the defendant did not make any arrangement to make payment of the balance purchase price. Thus, it is clear that the defendant was in breach of contract in not making payment of the balance purchase price.

[27] The rights of parties arising from a default of payment of purchase price by the purchaser is spelt out in cl. 10(1)(a)(i) of the SPA, which states that:

> If the Purchaser -
>
> (a) subject to subclause (3) below, fails to pay any instalment payable under subclause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under clause 9 for any period in access of twenty-eight (28) days after its due date;
>
> ...
>
> the Vendor may, subject to subclause (2) hereof, annul the sale of the said Property and forthwith terminate this Agreement ...

However, before the plaintiff can avail itself of the right to terminate the SPA on account of non-payment of the purchase price, it must give the requisite notice as required under cl. 10(2), which reads:

> Upon the occurrence of any of the events set out in paragraph 10(1)(a), (b), (c) or (d) herein, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered Post to treat this Agreement as having been repudiated by the Purchaser and unless in the meantime such default and/or breach alleged is rectified or such unpaid instalments and interest are paid or subclause (3) hereof shall apply, this Agreement shall, at the expiration of the said notice at the option of the Vendor be deemed to be terminated.

The defendant admits having received the letter dated 30 October 2013 (p. 13 of Bundle B) issued pursuant to cl. 10(2) of the SPA giving the defendant 14 days to make payment of the balance outstanding of RM287,900. There is no issue as regards service of the contractual notice. The defendant however did not rectify the breach by tendering payment of the balance purchase price, as demanded.

[28] Now, the defendant argues that as the deceased had obtained a loan to finance the payment of the balance purchase price, and had further procured the letter of undertaking from the third party to pay the loan sum to the plaintiff, and since the solicitor had confirmed that loan documentation had been perfected for disbursement, therefore the deceased, and by extension the defendant, had fulfilled their obligations under the contract. I am afraid that I am unable to accept that argument for the following reason. Clause 10(3) of the SPA provides that:

> If the Purchaser shall have before expiry of the said fourteen (14) days notice obtained approval of the Loan and paid the difference between the purchase price and the Loan and delivered to the Vendor the undertaking letter from the Financier to release the Loan to the Vendor, the Vendor then shall not annul the sale of the Property and terminate this Agreement unless the Financier shall default in its undertaking to release the Loan to the Vendor or fail to make the first disbursement of the Loan to the Vendor within thirty (30) days from the expiry of the said fourteen (14) days notice.

[29] Now this cl. 10(3) makes it very clear that even if the purchaser has procured the letter of undertaking from the financier to make payment of the progressive claim, the onus remains on the purchaser to ensure that the financier makes such payment within the stipulated time. As according to this clause even in situations where the financier has given a letter of undertaking to pay, the vendor may terminate the agreement in the event of the failure of the financier to make such payments timeously.

[30] The law is well settled that the payment of purchase price in a contract for a sale of real property is a fundamental contractual term. The failure or default on the part of the purchaser to make payment of the purchase price is a fundamental breach, which is ground for termination of the contract. In *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585, the Court of Appeal decided as follows:

The obligation to pay the purchase price is a fundamental obligation. The Court of Appeal in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 at p. 682 ruled:

> In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is fundamental.

Thus, any breach for non-payment of the purchase price shall go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited (*Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). In the instant case, where time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time (see *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711).

[31] In the present case, the SPA is in the standard form Schedule G of the Housing Development (Control and Licensing) Regulations 1989, and cl. 8 stipulates that time shall be the essence of the contract in relation to all provisions of the agreement. Thus, the non-payment of balance purchase price of RM287,900 in accordance to the stipulated time is a fundamental breach of the SPA and amounts to a repudiation of the contract on the part of defendant. The plaintiff is entitled to accept the repudiation and terminate the contract in accordance to the stipulations in cl. 10(1)(a)(i) of the SPA, which is precisely what the plaintiff did *vide* letter dated 19 November 2013. Therefore, in the circumstance, I find that the plaintiff's termination of the SPA is valid and lawful.

Issue 2: What Is The Effect Of The Termination Of The SPA

[32] Clause 10(1) of the SPA provides that if the defendant defaults in payment of the purchase price or any part thereof, the plaintiff is entitled to annul the sale and terminate the agreement. The same cl. 10(1) further stipulates that in the event of termination of the SPA by the plaintiff, the following consequences would ensue:

> The Vendor may, subject to subclause (2) hereof, annul the sale of the said Property and forthwith terminate this Agreement and in such an event:
>
> (i) the Vendor shall be entitled to deal with or dispose of the said Property in such manner as the Vendor shall see fit as if this Agreement had not been entered into;
>
> (ii) the instalments previously paid by the Purchaser to the Vendor, excluding any interest paid, shall be dealt with and disposed of as follows:
>
> (a) firstly, all interest calculated in accordance with clause 9 hereof owing and unpaid shall be paid to the Vendor;

A (b) secondly, a sum equal to ten per centum (10%) of the purchase price thereof shall be forfeited to the Vendor; and

(c) lastly, the residue thereof shall be refunded to the Purchaser;

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

B (iv) each party hereto shall pay its own costs in the matter.

[33] The contractual stipulation is, therefore, very clear; in that, upon the annulment/termination of the sale, the plaintiff is entitled to deal with the property in such manner as the plaintiff deems fit, as if the SPA had not C been entered into. Thus, the status of the property must revert to its pre-contractual state. Now, in the present case, the ownership of the property has been transferred and registered in the name of the deceased even before the full payment of the purchase price. This was done to facilitate the entry of the charge in favour of the third party and the release of the loan. D However, the third party never released the loan and had subsequently terminated the facility agreement and discharged the charge. Although registered ownership had been transferred to the deceased, the beneficial ownership remained with the plaintiff until the full purchase price is paid. See *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193 FC; *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time* E *Engineering Sdn Bhd)* [1996] 2 CLJ 561 FC. It is only upon the payment of the full purchase price that the beneficial ownership of the property vests with the defendant.

[34] It is well settled that upon rescission of a contract involving the sale F of land, the property will revest onto the original owner as if the contract was never entered into. This principle was reiterated by the Federal Court in *RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors and Another Appeal* [2015] 1 CLJ 309; [2016] 1 MLJ 175 in the following terms:

> When a contract is rescinded it has the effect of revesting any property G transferred in the transferor, so far as no formal steps are required for the retransfer. Thus property in goods will revest in the victim of fraud without more. If land has been conveyed, rescission will have the effect that the representor holds the title on constructive trust for the representee (*Chitty on Contracts* (13th Ed, Vol 1) para 6-114; see also *Greater Pacific Investments Ltd (in liquidation) v. Australian National Industries Ltd* (1996) H 39 NSWLR 143 at p. 153). ... ... 'Upon a valid rescission of a contract at common law the legal title to the property which had passed to the wrongdoer automatically revests in the complainant. This is the case in relation to rescission on the ground of fraudulent misrepresentation [for rescission on the ground of innocent misrepresentation, see *Admiral Cove Development Sdn Bhd v. Balakrishnan a/l Devaraj & Anor* [2011] 5 MLJ 309, I and *Sim Thong Realty Sdn Bhd v. Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460. ... when granting rescission in equity, the court has powers to make appropriate orders for revesting of legal title … the court recognises that, upon rescission of the contract, the beneficial title, which had passed to

> the transferee, revests in the transferor. The revesting is retrospective, since it seeks to put the complainant (transferor) in the position in which he would have been if the parties had not entered into the contract. This retrospective revesting gives the transferor a sufficient proprietary title to trace and recover the property.

Thus, following the termination of the SPA, the plaintiff would be entitled to a revesting of the property in its name as the registered and beneficial owner, as if the SPA was never entered into in the first place.

[35] The deceased had paid the plaintiff the sum of RM50,900 as deposit and part payment of the purchase price. Following the termination, according to cl. 10 of the SPA, the plaintiff is contractually entitled to keep the sum of RM33,880 being the 10% forfeitable deposit; and shall be further entitled to late payment interest charges calculated at 10% per annum on the outstanding amount. See *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89 PC; *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345; [1987] 2 MLJ 711; *Soon Yee Ling & Anor v. Lim Ah Hun* [2010] 2 CLJ 785; [2011] 1 MLJ 735 FC. The plaintiff has calculated late payment interest in accordance to the stipulation in cl. 10 to be RM23,854.14. Therefore, the total amount that the plaintiff is entitled to is RM57,734.14 (RM33,880 + RM23,854.14). Thus, I find that the plaintiff is entitled to keep the full amount of RM50,900 paid by the deceased, towards an account of the amount of RM57,734.14 that the plaintiff is contractually entitled to.

Issue 3: Is The Third Party Under A Duty To Disburse The Loan Promptly And If So Did It Fail To Discharge That Duty

[36] The defendant contends that the deceased had executed the facility agreement and attended to all matters that was required of him for the loan to be disbursed, and that in fact the solicitors handling the loan documentation had *vide* letter dated 3 September 2012 confirmed to the third party that the loan documentation was complete and that the charge in favour of the third party had been registered and therefore "subject to the fulfilment of all conditions precedent" the solicitors were of the opinion that it was in order for the third party to disburse the loan progressively to the plaintiff. Thus, the defendant states that a speedy and prompt disbursement of the loan, including the payment of the MRTA premium of RM9,137 would have meant that the full purchase price would have been settled partially by the progressive loan disbursement up till the deceased's death and partially by the proceeds of the MRTA upon the death of the deceased on 27 September 2012.

[37] This solicitors' letter of instruction dated 3 September 2012 was received by the third party on 5 September 2012. The third party's officer attending to the loan disbursement, namely Puan Norallieza binti Samsuddin (TPW2), wrote an email to the solicitors on 5 September 2012 informing that

A the documentation was incomplete and requested the solicitors to forward (i) the statutory declaration affirmed by the deceased confirming that the property was for owner occupation, and (ii) the original of the official land search. TPW2 informed the solicitors that these documents were necessary before the loan could be disbursed. A copy of the email was tendered in court
B marked as exh. "TP-2".

[38] The defendant states, that even though the documents requested by TPW2 had been forwarded together with the solicitors' letter of instruction dated 3 September 2012, the solicitors once again forwarded these two documents to the third party *vide* cover of letter dated 7 September 2012
C (p. 140 of Bundle E). That letter together with the accompanying documents were delivered to the third party's office in Johor Bahru on 14 September 2012. The third party's acknowledgement stamp dated 14 September 2012 is affixed on that letter. Therefore, the defendant submits that all conditions for the disbursement of the loan had been fulfilled and therefore, in
D accordance to the facility agreement and the letter of undertaking, the third party ought to have promptly disbursed the loan progressively and also pay the MRTA premium.

[39] In support of this contention, learned counsel for the defendant refers to s. 47 of the Contracts Act 1950 for the proposition that when a contract
E does not provide time for performance then it must be performed within reasonable time. See also *Penang Development Corporation v. Khaw Chin Boo & Anor* [1993] 3 CLJ 167 – where the court held that time cannot be arbitrarily fixed by a party and that it must reasonable having regard to the state of things at the material time.

F **[40]** Learned counsel for the defendant has further found support for his contention in the High Court case of *Khatijah Ahmad v. CIMB Bank Bhd* [2011] 1 LNS 1518; [2011] MLJU 1194, where Vernon Ong J (as he then was) in construing the issue of whether the defendant bank was negligent in not disbursing a loan timeously, held:

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> In this case, the relationship between the parties was that of bank and customer. Since the plaintiff's loan application had been approved, the defendant owed a duty of care to the plaintiff to process and disburse the loan within a reasonable time; as shall accord with normal banking custom, practice and procedures.

H **[41]** Therefore, if all conditions for disbursement had been fulfilled, the third party must disburse the loan within a reasonable time, having regard to industry practice or even the practice of the third party. In this regard, learned counsel for the defendant submits that both the third party's witnesses, Nor Allieza binti Samsuddin (TPW2), and Azman bin A Wahid
I (TPW1), had testified that the "Standard Operating Procedure" of the third party was for any loan to be disbursed within one day after the loan documents were in order and the pre-disbursement conditions have all been

fulfilled to the satisfaction of the bank. Therefore, learned counsel for the defendant submits that the loan ought to have been disbursed with its first drawdown on the next business day after 14 September 2012 (Friday), which falls on 17 September 2012 (Monday). The failure to do so, submits counsel, is a breach of the duty of care imposed on the third party, and therefore counsel contends that this is negligence on the part of the third party.

[42] Learned counsel for the third party counters that argument as follows. Whilst, the documents sought by TPW2 were delivered at the third party's Credit Administration Centre in Johor Bahru on 14 September 2012, TPW2 did not receive them on that day. The reason for the delay in TPW2 receiving these two documents is that the covering letter of 7 September 2012 not only attached the two documents requested by TPW2, but also the original title deed to the property and the duplicate charge dated 29 September 2012. These two latter documents, namely, the title deed and duplicate charge, which are security documents are kept by the Credit Support Unit of the third party. Thus, according to TPW2, the solicitors' letter of 7 September 2012 and all the documents attached thereto were sent initially to the Credit Support Unit and whilst the documents were being processed and before the requested documents arrived at TPW2's desk, the deceased had unfortunately passed away. Therefore, learned counsel for the third party, whilst conceding that the standard operating procedure for disbursement of loan is one day, submits that the one day would be from the time when the officer handling the approval for disbursement, in this case TPW2, has received all the necessary documents and is satisfied that all pre-disbursement conditions have been complied or fulfilled. And since TPW2 did not receive the documents up until the death of the deceased on 27 September 2012, counsel submits that, the third party was under no obligation to make disbursement of the loan.

[43] Having considered the submissions of parties, I am inclined to agree with learned counsel for the third party. I find that there is no deliberate delay on the part of the third party in disbursing the loan. TPW2, who was the officer handling the disbursement, had promptly replied the solicitors' letter of 3 September 2012 (which was received on 4 September 2012) on the very next day, ie, 5 September 2012, *via* email requesting for the missing documents. The solicitors forwarded the requested documents together with several other documents, which were not required by TPW2, but were meant for safekeeping by another department. This mixture of documents was sent to the third party on 14 September 2012 and had been routed to the Credit Support Unit by virtue of the original title deed and duplicate charge that were enclosed. These are important security documents and I can readily understand the reason why all these documents, including the ones required by TPW2, were sent to the Credit Support Unit first. Therefore, the loan disbursement could not be approved by TPW2, as she did not receive the documents even up till the death of the deceased. During the period from

14 September 2012 till the deceased's death on 27 September 2012 (ie, nine working days) the documents were obviously flowing through and/or floating within the third party's office in Johor Bahru. The third party cannot be faulted for not having the documents on the desk of TPW2 much earlier. The solicitor, En Mohd Nazri bin Abd Hamid (DW2), a partner in the firm of Messrs Anuar Hong & Ong in his testimony did not make mention of him or his office following up with TPW2, or anyone else at the third party's office, as regard the loan disbursement after the dispatch of the documents under cover his letter of 7 September 2012. The receipt of the documents after the death of deceased would be of no use in the scheme of things, as the event of the deceased's death completely altered the legal landscape insofar as the loan agreement was concerned, and I will attend to that shortly. Therefore, from the totality of the evidence, I do not find that the third party was in breach of its duty of care to make prompt disbursement of the loan. Additionally, the third party's onus to pay the plaintiff as per the letter of undertaking would only arise when the conditions for payment stipulated in the letter of undertaking have been first fulfilled, for the undertaking is at best a conditional undertaking. See *Siti Juriah Sahari & Yang Lain lwn. Citibank Bhd & Satu Lagi* [2010] 1 CLJ 252. The payment of the MRTA premium is linked to the initial disbursement of the loan. Only when the first drawdown of the loan had been made, would the third party makes payment of MRTA premium, and since the initial loan disbursement was not made for reasons discussed earlier, I do not find the third party having breached the contractual obligations to pay the MRTA premium or having breached its duty of care in that respect.

Issue 4: Is The Termination Of The Loan Agreement By The Third Party Valid And Lawful

[44] The following clauses in the letter of offer are relevant.

Clause 8 – Appendix II of the letter of offer provides:

> 8. CANCELLATION/SUSPENSION AND DEMAND
>
> Notwithstanding any other provisions herein stated relating to the availability of the facility(s) or any part thereof, the Bank reserves the right to recall or cancel or suspend the facility(s) or any part thereof, at any time it deems fit without assigning any reason thereto by giving notice of the same whereupon the facility(s) or such part thereof shall be recalled or cancelled and the whole indebtedness or such part thereof shall be repayable upon demand or suspended until such time as the bank deems fit to uplift the suspension or recall or cancel the suspended facility(s).

Clause 13 – Appendix II of the letter of offer reads:

> 13. EVENTS OF DEFAULT
>
> Notwithstanding any of the provisions herein relating to repayment to the facility(s), the facility(s) or any part thereof may be cancelled whereupon all principal and advances for the time being outstanding and unpaid

together with interest thereon and all other moneys owing to the Bank secured by any security shall be repayable on demand in the event:

...

ii. You, your guarantor or security party dies, become insane or is adjudicated a bankrupt or is wound up;

...

vii. Any event occurs or circumstances arose including changes in your financial condition which in the opinion of the Bank would materially affect your ability or your guarantor or security party's ability to perform or comply with your/his obligations to the Bank;

Further, the following clauses in the facility agreement are relevant to the determination of this issue.

Section 5.01 CONDITIONS PRECEDENT TO DRAWING

The Borrower may not commence to make any Drawings on the Facility until the fulfilment in manner satisfactory to the Bank, prior to the first (1st) Drawdown date, of the following conditions precedents:

...

(e) the Bank is satisfied that as from the date when the Borrower first applied the Facility there have been no material adverse changes in the financial affairs of the Borrower which could or might adversely affect the decision of the Bank to proceed with or continue the Facility.

And s. 5.02 provides:

SECTION 5.02 CONDITIONS PRECEDENT TO DISBURSEMENT

Notwithstanding Section 5.01, the obligation of the bank to make available any Drawing or disbursement thereof is also subject to following conditions:

(a) the Bank is satisfied that no event has occurred so as to render the Facility or any of the Advances to become immediately repayable under the provisions of any of the Security Documents;

...

(d) there is no default by the Borrower and/or the Security Party in the performance of any of the terms and conditions contained in any of the Security Documents;

And s. 11.01 states:

SECTION 11.01 EVENTS OF DEFAULT

The Borrower is deemed to have committed a default if the Borrower commits or threatens to commit a breach of any of the covenants, undertaking, stipulations, terms, conditions, or provisions herein stipulated and without prejudice to the generality of the foregoing, upon the happening of any one or more of the following events:

A ...

(s) if the Borrower or any Security Party who is a natural person or individual dies or becomes insane or is adjudged a bankrupt; or ...

And finally, s. 11.02 provides:

B SECTION 11.02 RIGHTS OF BANK ON DEFAULT

If the default pursuant to Section 11.01 or if any of the events stipulated in Section 11.01 hereof shall happen and which is capable of remedy is not remedied ..., the Bank shall be entitled forthwith to take such action as may be appropriate against the Borrower.

C Now, from these contractual clauses, it is quite evident that the death of the deceased, the borrower, is an event of default. And in the event of a default occurring the third party is at liberty to withdraw and/or cancel the facility. Additionally, the death of the deceased is definitely a material adverse change in circumstances and in such an event it is open to the third party D consider whether it wishes to continue with the agreement or to cancel it. The third party in exercising its discretion had chosen to cancel the facility. In the circumstance, I find that it was within the third party's contractual right to terminate the loan agreement upon the death of the deceased. Therefore, I find that there is no basis in law, or in fact, to sustain the E defendant's action against the third party.

[45] In the premise of the foregoing, judgment was entered for the plaintiff against the defendant in terms of prayers in para. 14(a), (b), (c) and (d) of the amended statement of claim. The defendant's third party claim was dismissed.

F **[46]** Parties to bear their own cost. Orders accordingly.

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